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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 910.

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1,

Petitioner,

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF PETITIONER.

OPINIONS BELOW.

The opinion of the court of appeals (A. 183-200), is reported at 427 F.2d 936. The order denying the petition of the National Labor Relations Board for rehearing is printed in the Appendix at page 202. The findings of fact, conclusions of law, and order of the National Labor Relations Board (A. 25-48) are reported at 177 NLRB No. 114.

JURISDICTION.

The judgment of the court of appeals (A. 201) was entered on June 10, 1970. The Board's timely petition for rehearing *en banc* was denied (Judges Edwards and McCree dissenting) on July 31, 1970 (A. 202). The petition for a writ of certiorari was filed on October 27, 1970 and granted on February 22, 1971, simultaneously with the grant in *National Labor Relations Board v. Pittsburgh Plate Glass Co.*, No. 961, this Term, and both cases are consolidated, 91 S. Ct. 867 (A. 203). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are printed in the Appendix to this brief, *infra*, pp. 33-38.

QUESTIONS PRESENTED.

(1) Whether an employer violates Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain with the statutory bargaining representative of his employees about changing health insurance benefits previously negotiated for retired employees; and (2) Did the Board properly find that the Company unilaterally changed its negotiated health insurance plan for retired employees, in violation of Section 8(a)(5) and (1) of the Act.

STATEMENT.

A. THE BOARD'S FINDINGS OF FACT.

The Union Petitioner, Allied Chemical & Alkali Workers of America, Local No. 1, has been the exclusive bargaining representative of hourly-rated employees at the Company's Barberton, Ohio plant since 1949 (A. 26; 116). The Union negotiated its first pension agreement with the Company in 1950. At the same time it reached a verbal understanding on a medical insurance and hospitalization program for retired employees (A. 26; 116, 150, 151). Retired employees paid for this insurance through deductions from their monthly pension checks (A. 26, 117). In 1954 the hospitalization coverage for retirees was increased to $10.00 a day (A. 26; 151). In 1959 the Union and Company negotiated an increase in the daily hospitalization benefits and this understanding was embodied in a written agreement (A. 26; Co. Exh. 1; 108, 109, 117, 151, 152).

In 1962 the Company and Union agreed upon a reduced hospitalization and surgical plan for employees retiring after June 27, 1962. This cost $11.41 per month for the retiree and his spouse. The Company agreed to contribute $2.00 per month per employee toward the cost of this plan and to provide a $2,000 life insurance policy at no cost to the employee (A. Gen. Co. Exh. 2; 56, 118). An amended pension agreement was negotiated also which increased benefits and made retirement mandatory at age 65 for those retiring after June 28, 1964 (A. Gen. Co. Exh. 4; 61-64, 120).

In the 1964 negotiations the Company increased its monthly contribution from $2.00 to $4.00 for those retirees who had subscribed to the 1962 reduced hospitalization and surgical plan. The parties agreed also that the

Company would reduce its contribution by the amount of the 1964 increase when Medicare became effective (A. 27).

Medicare was enacted on July 30, 1965 and became effective on July 1, 1966.[1] In November, 1965 the Union proposed that the Company engage in mid-term bargaining concerning supplemental insurance benefits which were not available to retired employees under the Medicare program.

On March 21, 1966 the Company advised the Union that because of the enactment of Medicare it would withdraw the $2.00 contribution which had been added by the 1964 labor agreement. The Union was also informed that the negotiated insurance program would be terminated because the Company's insurance carrier contended that the non-duplication of benefits provision in the Company's policy precluded payment of benefits provided by Medicare (A. 27, 28). Instead, the Company decided to contribute $3.00 a month for each retired employee to cover the cost of his supplemental Medicare coverage (A. 28). The Union's request to bargain about its proposal to "add-on" benefits not provided by Medicare was rejected and the Company challenged altogether the Union's right to bargain for retired employees (A. 28).

The Union conceded the Company's right to withdraw the $2.00 contribution added by the 1964 labor agreement, but protested the termination of the insurance program (A. 28). The Union stated that the cancellation of the insurance program would create other problems because retired employees and their wives under age 65, and not eligible for Medicare, would be without any protection (A. 126). The Company declared that it would prepare a plan to cover retirees and their wives not yet eligible for Medicare (A. 126).

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[1] Health Insurance for the Aged Act, Pub. L. 89-97, 79 Stat. 291, 42 U.S.C. 1395 (1965).

On March 23, 1966 the Company told the Union that it had reconsidered its earlier position and decided not to abrogate the negotiated health insurance plan for retirees. Instead, each retired employee would be required to elect between remaining in the existing insurance plan, or withdrawing from participation and accepting in lieu the Company's $3.00 per month contribution toward payment of supplemental Medicare benefits (A. 28). The Union objected but the Company refused to bargain about changes in the retirees' program to supplement Medicare.

On March 24, the Company advised all retirees by mail of its decision and that they had to complete their Medicare enrollment by March 31, 1966 if they withdrew from participation in the Company plan. Retirees were advised further that where the current monthly contribution was $4.00 for those remaining in the plan, it would be reduced to $2.00 when the Social Security benefits became available (A. Gen. Co. Ex. 7, 92-99, 129). Fifteen retired employees cancelled their participation in the health insurance plan (A. 28). On April 12, 1966 the Union filed charges with the Board alleging that the Company's conduct constituted a refusal to bargain (A. 3, 28).

B. THE BOARD'S DECISION AND ORDER.

On the basis of the foregoing facts which are not in dispute, the Board (Member Zagoria dissenting, A. 48-52), found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union about changes in benefits provided for employees who were retired from the bargaining unit, and by unilaterally changing their insurance benefits (A. 47). The Board concluded that retirees are "employees" within the meaning of the Act for the purpose of bargaining about changes in their

retirement benefits; that bargaining about such changes is within the contemplation of the statute because of the interest which active employees in the bargaining unit have in the subject; and, that bargaining about the subject of benefits for retirees is comprehended by the statutory requirement of bargaining about "wages, hours, and other terms and conditions of employment" (A. 30).

C. THE DECISION OF THE COURT OF APPEALS.

The court of appeals held that the Company was not required to bargain with the Union about changes in the hospitalization and medical insurance plan for retired employees because they were neither "employees" under Section 8(a) (5) of the Act (A. 191), nor members of the bargaining unit as defined in Section 9(a) of the Act (A. 199). The finding that the Company unilaterally changed the negotiated insurance benefits of its retired employees was rejected (A. 191) and the court denied enforcement of the Board's order (A. 200).[2]

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[2] The Board, with due deference to the lower court's decision, adheres to the ruling in the instant case in decisions subsequent thereto: *Westinghouse Electric Corporation*, 188 NLRB No. 126 (1971); *Union Carbide Corporation, Carbon Products Division*, 187 NLRB No. 10 (1970); *Hooker Chemical Corporation, etc.*, 186 NLRB No. 49 (1970).

SUMMARY OF ARGUMENT.

In the two decades following the decisions in *Inland Steel Co. v. NLRB*, 170 F.2d 247 (1948), and *W. W. Cross & Co. v. NLRB*, 174 F.2d 875 (1949), there has been a steady increase in the number of collectively bargained retirement plans providing pensions and insurance benefits for employees.[3] In 1950 the Company provided a hospitalization insurance plan for retired employees and by 1964 there was in effect a negotiated hospitalization and medical program tied into a retirement plan.

The enactment in July, 1965 of the "Health Insurance For the Aged Act," Publ. L. 89-97, 42 U.S.C. 1395, et seq., established a program of basic protection for the aged against the cost of hospital services, 42 U.S.C. 1395c, and a voluntary supplementary program to cover the costs of doctors' services and related items to be financed in part by premium payments by enrollees. 42 U.S.C. 1395j. The 1964 negotiations between the Company and the Union anticipated its enactment. The Board found a violation of Section 8(a)(5) and (1) of the Act when the Company refused the Union's request to bargain about changes in the insurance plan that would make it compatible with Medicare. The Board concluded that retirees were employees for the purpose of bargaining about changes in their retirement benefits and that bargaining about retirement benefits provided retirees was entirely consistent with the statutory requirement that "wages, hours, and other terms and conditions of employment" be a mandatory subject of collective bargaining.

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[3] Welfare and Pension Plans Disclosure Act, 1958, Section 2(a), 72 Stat. 997, 29 U.S.C. Section 301(a): "The Congress finds that the growth in size, scope, and number of employee welfare and pension benefit plans in recent years has been rapid and substantial; * * *"

The Board's interpretation of the statute that retired employees were "employees" for the purpose of bargaining about changes in their retirement benefits was fully justified and is entitled to "great deference," *Griggs v. Duke Power Co.*, ____ U.S. ____, 91 S. Ct. 849, 855 (1971); *United States v. City of Chicago*, 400 U.S. 8, 91 S. Ct. 18, 20.

The statutory obligation of bargaining is not diminished because it involves a matter affecting retired workers who are no longer on the active payroll. This Court in *Local 24, Teamsters v. Oliver*, 358 U.S. 283 (1959), held that the union was entitled to bargain about minimum rentals to be paid owner-drivers on trucks to be driven, not by employees, but by their owner-drivers and it was not necessary to determine whether these owner-drivers were employees. These minimum rentals affected the terms and conditions of employment of the employees. Here, as in *Oliver*, it is not necessary to determine whether retired workers are employees within the statutory definition as that term is set forth. It is sufficient, as the Board found, that the benefits for the retired workers "were integral" to the terms and conditions of employment of the active employees.

The retirement benefits involved here were part of a larger Company retirement plan negotiated with the Union covering active as well as retired workers. The enactment of Medicare in 1965 made changes in that plan of utmost importance to the retired workers. The Company's refusal to bargain with the Union and the unilateral changes which followed altered an existing plan and were in defiance of the Act and the statutory rights of the Union. It deprived the retired workers of the opportunity immediately available to understand what was to be done and to make an intelligent choice of alternate possibilities.

Sections 8(a)(5) and (1) of the Act were also violated when the Company required retirees to accept one or the other of two alternatives, thus changing and modifying an existing negotiated plan. This conduct ignored various other possibilities which might have been made available to retirees had the Company bargained with the Union. By its failure to do so it violated Section 8(a)(5) and (1) as well as Section 8(d) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. General Electric Co.*, 418 F.2d 736 (CA-2, 1969), cert. denied, 397 U.S. 965 (1970).

ARGUMENT.

A. INTRODUCTION.

This case consolidated with *National Labor Relations Board v. Pittsburgh Plate Glass Company, Chemical Division*, No. 961, this Term, raises for the first time in the administration of the Act, the question of whether the negotiation of changes in retirement benefits for retired employees is a mandatory subject of collective bargaining. The practice in industry has been to bargain about changes in benefits provided retirees. The comprehensive data in the Appendix of the brief *amicus curiae* for the American Federation of Labor-Congress of Industrial Organizations, and International Union, United Automobile Workers, on petition for a writ of certiorari in No. 961, this Term, demonstrates the extent of collective bargaining on this issue in American industrial life.

The lower court refusing to enforce the Board's order concluded that the Company was privileged to bargain individually with retired employees about changes in their hospitalization and medical insurance benefits, and was not mandated to bargain with the Union about these changes (A. 191). In its analysis of the issues the court

juxtaposed the definition of an employee found in Section 2(3) of the Act with Section 8(a)(5) which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of "his employees." The lower court found that the language of Section 8(a)(5) limited the Union's right to bargain to employees actively employed in a unit appropriate for that purpose under Section 9(a) and that retirees were not employees (A. 195, 196). The Court rejected the Board's informed and considered judgment based upon extensive industrial acceptance and understanding of the practice of bargaining about the benefits of retired employees.

B. EXPANDING SCOPE OF THE DUTY TO BARGAIN.

Collective bargaining is defined by Section 8(d) of the Act, and, in pertinent part, provides that:

> "* * * to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *." (App., *infra*, p. 35).

The decisions in *Inland Steel Company*, 77 NLRB 1 (1948), enforced *Inland Steel Co. v. NLRB*, 170 F.2d 247 (CA-7, 1948), cert. denied 336 U.S. 960, and *W. W. Cross & Company*, 77 NLRB 1162 (1948) enf'd. *W. W. Cross & Co. v. NLRB*, 174 F.2d 875 (CA-1, 1949), determined that employee pension, group health and accident insurance programs were mandatory subjects of collective bar-

gaining. The principle of these decisions has become firmly fixed in the development of the collective bargaining process as practiced by labor and management.

The court's decision removes the subject of pension rights and improvement in health care for the retired employee from the bargaining table and makes it dependent, in the lower court's phrase, upon "the increasingly humanitarian quality of the labor-management relationship" (A. 200). The decision freezes the subject of changing health care patterns at a time of general inflationary pressures and increasing need for health protection.[4]

Collective bargaining is a constantly evolving process which reflects the mutual obligation of an employer and union to meet and confer about "wages, hours, and other terms and conditions of employment." *Telegraphers v. Railway Express Agency,* 321 U.S. 342, 346 (1944); *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 211 (1964); *Local 24, Teamsters v. Oliver,* 358 U.S. 283 (1959).[5] The Board observed in *Houston Chapter, Associated General Contractors,* 143 NLRB 409, 413 (1963):

> "* * * we note the language of the Supreme Court in [*Order of Railroad Telegraphers v. Chicago & N.W. R.R. Co.*, 362 U.S. 330, 338 (1964)] that '* * * the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow the scope of subjects about which workers and railroads may or must negotiate and bargain collectively.' This language takes on added significance from the fact that the courts have held that the bargaining obligation under the National Labor Relations Act is *broader* in scope than under the Railway Labor Act. Thus, the

[4] Ehrenreich, *Private Health Insurance and Medical Care,* U.S. Dept. of H.E.W. Social Security Administration, p. 1 (1968).

[5] We propose to show that the collective bargaining process was necessary to accommodate recently enacted federal law to the parties' collective bargaining agreement.

> range of mandatory subjects of bargaining under the National Labor Relations Act has been found to include Christmas bonuses; retirement and pension plans; vacations; an employees' stock purchase plan; union security, checkoff, seniority, and grievances; and more recently the elimination of jobs through subcontracting, or because of technological changes. As the relationship between employers and employees evolves, new areas may be found which affect 'wages, hours, and other terms and conditions of employment,' and thus the list of mandatory subjects of bargaining quite properly is enlarged." (Emphasis in original, footnotes omitted.)

The Company's obligation to bargain collectively with the Union does not cease because some beneficiaries of the Union's representation are persons who do not meet the criteria used by the Board in determining eligibility to vote in a Board conducted representation election. Section 2(3) of the Act (App., *infra*, p. 33) states in part that:

> "(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, * * *"

This Court said the term "employee" like other provisions, "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship," *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 129 (1944); *NLRB v. E. C. Atkins & Son Co.*, 331 U.S. 398, 403 (1947). Thus the Board found specifically in the instant case that:

> "* * * From our study of the Labor Act, its policies, its legislative and decisional history, we conclude: First, that retired employees are 'employees' within the meaning of the statute for the purposes of bargaining about changes in their retirement benefits; second,

> that bargaining about changes in retirement benefits for retired employees is in any event within the contemplation of the statute because of the interest which active employees have in this subject; and, third, that bargaining about such benefits is fully consonant with the statutory requirement that 'wages, hours, and other terms and conditions of employment' be subject to the institution of collective bargaining envisioned by the Act." (A. 30) [6]

The conclusion that retired persons are "employees" within the meaning of the Act for the purposes of bargaining about change in their retirement benefits, is an interpretation which is wholly consonant with modern labor-management relations, giving added substance and meaning to the collective bargaining process.

This interpretation of the Act should be given great weight. On March 8, 1971, the Court said, "The administrative interpretation of the [Civil Rights Act of 1964] by the enforcing agency is entitled to great deference." *Griggs v. Duke Power Co.*, ____ U.S. ____, 91 S. Ct. 849, 855. This Court continues to emphasize the importance of deference to an administrative interpretation by the agency charged with the initial interpretation of a new law, *United States v. City of Chicago*, 400 U.S. 8, 91 S. Ct. 18, 20; *Udall v. Tallman*, 380 U.S. 1 (1965) and *Local No. 207, International Association of Bridge Workers, etc. v. Perko*, 373 U.S. 701, 706 (1963), where it was said that "* * * difficult problems of definition of status, * * *" are precisely " 'of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole'," quoting *Marine Engineers Beneficial Assn. v. Interlake Steamship Co.*, 370 U.S. 173, 180 (1962).

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[6] The court below was in error when it said that: "* * * the Board made no finding in this case that retirees are employees within the meaning of the Act." (A. 195 n. 14)

Collective bargaining is an on-going process continually reflecting developing trends in labor-management relations.[7] *Inland Steel Co. v. NLRB*, 170 F.2d 247, cert. denied 336 U.S. 960, spoke of "the increasing problems arising from the employer-employee relationship." It referred to this Court's decision in *Weems v. United States*, 217 U.S. 349, 373 (1910), wherein it was said that, "* * * a principle to be vital must be capable of wider application than the mischief which gave it birth." In *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 350 (1958) the Court construed the definition of collective bargaining and laid down two tests to be used in deciding whether the phrase, "wages, hours, and other terms and conditions of employment" of Section 8(d) made a particular subject one for mandatory bargaining: (1) Does the subject matter settle a term or condition of employment, or (2) Is it one which regulates the relations between the employer and the employees. Insurance benefits for retirees regulate relations between the employer and employees within the meaning of *Borg-Warner*. The retired employees' health plan also places a monetary value on past services and in this fashion settles a condition of employment between the employer and employees. The employer's payment of the premium is another form of compensation receipt of which has been deferred to a time when the retirees' needs are the greatest. The term "wages" includes pension and beneficial insurance rights for the purposes of collective bargaining, *Inland Steel Co.*

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[7] Illustrative of some of the subjects of major concern affecting labor relations today is the table of contents of *Collective Bargaining Today*, BNA (1970), Institute of Collective Bargaining and Group Relations: Medical and Hospital Costs; Conglomerate Mergers; Resolution of Manning Issues; The Multinational Corporation; Government Military Procurement; The Consumer and Environment.

v. NLRB, supra, at p. 251. In the instant case the lower court recognized that: "pensions and insurance benefits to be enjoyed by employees after retirement are 'wages' for the purposes of the statute, albeit deferred ones, and that insofar as they accompany a provision specifying a mandatory retirement age, * * * are also conditions of employment" (A. 190).

The Board, with court approval, has refused a rigid construction of the phrase "wages, hours and other terms and conditions of employment" set out in Section 8(d) of the Act. The phrase has been construed with reason and understanding and a correct appreciation of the expanding nature of the scope of the collective bargaining obligation under the Act.

C. ACTIVE EMPLOYEES HAVE A VITAL CONCERN IN THE BENEFITS PROVIDED FOR RETIRED EMPLOYEES.

1. The Board found that health insurance benefits for retired employees vitally affect employees in the bargaining unit and are, therefore, embraced within the employer's bargaining obligation (A. 38).[8] In *Teamsters Union v. Oliver,* 358 U.S. 283, this Court evaluated the effect upon employees of written lease agreements for vehicles which did not cover actual operating costs, and in *Fibreboard Paper Products Corp. v. Labor Board,* 379 U.S. 203, it had to reckon with the effect upon unit employees of a unilateral determination to subcontract bargaining unit work.

Bargaining about retirement benefits vitally affects active bargaining unit employees. Unions and employees

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[8] The Company's unilateral action in 1966 changed an agreement made earlier when some of the retirees were still on the active payroll within the collective bargaining unit (A. Gen. Co. Exhs. 2, 5; p. 56, 88, 118, 121).

want to be sure that bargained-for-benefits are received. Improving their economic security upon retirement is a continuing concern of all workers. "Promise of retirement benefits help to attract good workers and pay dividends to the employer in terms of longevity of service and favorable employee morale." [9]

Few subjects in recent years have engaged more time and attention of labor-management representatives than collective bargaining about pensions, medical care, and hospitalization coverage for active and retired employees. The active worker is concerned about the tremendous increase in the cost of health protection and its depressing effect upon his weekly earnings. He knows, however, that the improvement of medical and hospitalization benefits has a consequential effect when he retires. This improvement of benefits for the active worker induces beneficial changes for the retired worker as well.

Former Solicitor General Archibald Cox, while presiding as an arbitrator, expressed in this fashion the interest of active employees in seeing that negotiated pension increases would also be applied to the previously retired employee:

> "Nor was the union guilty of a breach of its fiduciary duties when it pressed for larger payments to retired pensioners instead of concentrating its full bargaining power in support of demands directly benefiting employees who were still in the bargaining unit. The union representatives and the current work force may well have been looking to the future. Each contract they are able to negotiate upon the principle that the liberalization of pension should extend to employees who have already retired may help to establish an accepted practice upon which the current em-

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[9] Note, *Pension Plans and the Rights of the Retired Worker*, 70 Colum. L. Rev. 909, 915 (1970).

> ployees may benefit after their retirement. Similarly, the union officers and members might believe that it would solidify and strengthen their organization to provide for the welfare of retired workers who had long held jobs that became part of the bargaining unit."
>
> (*United Drill and Tool Corporation*, 28 Labor Arbitration Reports (BNA) 677.)

The retiree must turn to his union to represent him when his retirement benefits are affected by inequities arising from inflation or other economic developments.[10] The union at the same time is constantly seeking to expand the scope of health insurance coverage for employees.[11] There is thus an interaction between one group and the other with advantages to both.

The constant interplay of these interests and their generation of ideas and programs to be initiated by unions affect simultaneously the active and retired worker. All of this suggests how closely allied are the interests of the active bargaining unit employees and the retired workers when it comes to a consideration of matters subject to the collective bargaining obligation of the Act. The renegotiation of insurance benefits for retirees is certainly no more "outside the range of matters on which the federal law requires the parties to bargain," *Teamsters Union v. Oliver*, 358 U.S. 283, 293, than the effect that the inadequate terms of a lease of a vehicle have on an active employee's wages. The question in *Oliver* was whether the fixing of a minimum rental to be paid by an employer

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[10] Recent commentators have suggested how low income groups are affected in "an era of general inflation" by the "rapidly rising cost of health care." Note, *Prepaid Group Practice*, 84 Harv. L. Rev. 887, 893, Feb. 1971.

[11] Bok & Dunlop, *Labor and the American Community*, p. 372 (1970).

for leased vehicles to be driven, not by his employees, but by owner-operators, could be subjected to collective bargaining. The inadequacy of the rental paid to an owner-operator "not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers," *Teamsters Union v. Oliver, supra,* at 294. Mr. Justice Brennan, speaking for the Court, said:

> "* * * It is not necessary to attempt to set precise outside limits to the subject matter properly included within the scope of mandatory collective bargaining, cf. *Labor Board v. Borg-Warner Corp.*, 356 U.S. 342, to hold, as we do, that the obligation under § 8(d) on the carriers and their employees to bargain collectively 'with respect to wages, hours, and other terms and conditions of employment' and to embody their understanding in 'a written contract incorporating any agreement reached,' found an expression in the subject matter of Article XXXII [of the contract]. * * * And certainly bargaining on this subject through their representatives was a right of the employees protected by § 7 of the Act," (358 U.S. at 294, 295)

Confronted with the question of whether "contracting out" of unit work was a mandatory subject of collective bargaining in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 211 (1964), this Court said:

> "* * * The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. * * * To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace."

The Court declared also, 379 U.S. at 211: "While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining.", citing *Labor Board v. American Nat'l. Ins. Co.*, 343 U.S. 395, 408 (1952).

The lower court was influenced by the absence of certain indicia of active employment status such as presence on the current payroll, performance of service, seniority, restrictions on other employment, and the right of recall to work (A. 195). Decisions of the Board in representation cases excluding retirees from participation in unit determination elections because of these factors were viewed by the court as inconsistent with the Board's decision in the instant case (A. 196, 197).[12] The criteria used by the Board, however, to determine eligibility to vote does not go to the heart of the matter which is whether bargaining about changes in retirement benefits of retired employees is within the contemplation of the statute because of the very real interest that active employees have in this subject.

The question presented here is not whether the broad definition of employee in Section 2(3) of the Act is

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[12] Board policy in representation cases excluding employees on retirement or those with little or no likelihood of recall from voting in representation elections, was in the court's judgment inconsistent with the Board's conclusion "that retirees should be included in the bargaining unit for the purpose of renegotiating their retirement benefits * * *" (A. 197). In finding that retirees are not employees the lower court relied upon two overruled decisions of the Board in representation cases: *Taunton Supply Corp.*, 137 NLRB 221, 223 (1962) (part-time workers who are social security annuitants excluded from unit), overruled in *Holiday Inn of Oak Ridge*, 176 NLRB No. 124 (1969) and *Denver-Colorado Springs Public Motor Way*, 129 NLRB 1184 (1961) (dual-function employee must perform more than 50 percent of his time in the unit to be included), overruled in *Berea Publ. Co.*, 140 NLRB 516, 519 (1963).

restricted by Section 8(a)(5) which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of "his employees." The question rather is whether insurance benefits for retired employees should be included as a mandatory subject of collective bargaining for the reasons set forth in the Board's opinion. When the Company refused to meet with the Union it was avoiding its statutory obligation to bargain about changes in retirement benefits for the retired employees. The lower court ignored the interest of the active employees in the subject of retirement changes and the effect of the changes upon their interests. The Board's contrary construction of the Act is not precluded because the pronoun "his" precedes the word "employees" in Section 8(a)(5). Thus the Board said in *Houston Chapter, Associated General Contractors,* 143 NLRB 409, 412, referring to this Court's decision, in *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941), that:

> "* * * we do not deem the Supreme Court to have limited its definition of 'employees' to those individuals already working for the employer,"

The lower court's interpretation of Section 2(3) fastened a restriction on the meaning of the term "employees" which was specifically rejected in *Teamsters Union v. Oliver, supra,* as Mr. Justice Brennan made clear in *United States v. Drum,* 368 U.S. 370, 382, n. 26 (1962):

> "* * * *Teamsters Union v. Oliver,* 358 U.S. 283, did not, as appellees suggest * * *, hold that owner-operators are in any sense 'employees'. That case held that a bargaining unit including an overwhelming majority of concededly employed drivers of carrier-owned equipment was entitled, under § 8(d) of the National Labor Relations Act, * * * to bargain to impasse concerning minimum rentals to be received by owner-drivers. It was not necessary to determine whether

> the owner-drivers were 'employees' protected by the Act, since the establishment of the minimum rental to them was integral to the establishment of a stable wage structure for clearly covered employee-drivers. * * * "

The decision below repudiated the principle that collective bargaining "generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States," *Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346 (1944). This absorption principle extends the statutory obligation of the Company and the Union to bargain with each other about retirement benefits. The lower court's holding has seriously impeded the orderly development of collective bargaining by ignoring this principle and approving the Company's direct dealing with the retirees.

2. The lower court feared that permitting the Union to represent the retiree would create conflicts to the retiree's disadvantage and affect the Union's representation of bargaining unit personnel. The Union does represent retired employees in a number of important respects without measure of conflict. The Company's pension agreement establishes the Union's right to pursue through appeal stages and into arbitration any differences which arose between the Company and a retiree concerning his age, years of continuous service, the cause of his disability, and disqualification, if any, from continuing to receive a disability pension in the event the retiree engaged in other employment (A. Gen. Co. Exh. 4, 61, 81, 82; 120). In addition, the Union had the right to join in the selection, with the Company, of a neutral physician if there was a dispute over a retiree's total or permanent disability (A. Gen. Co. Exh. 4, 83). Indeed, without the Union

the retiree was without any representation in these disputes arising out of the pension agreement. The Union's representation of retired workers in these matters was not in conflict with its representation of the active employees.

The court, moreover, was concerned about problems not related to the issues before it. For example, it expressed the opinion that if retirees were given "the bargaining power" they "would lose their economic security, for just as surely as an employer may increase benefits, in bargaining, he may take them away" (A. 200).[13] The retirees did not seek "bargaining power". It was the Union which sought to negotiate a change in their health insurance protection using its bargaining power because of the importance of the subject to both active and retired employees. The court's judgment was also affected by its belief that the Union would trade benefits of retirees who have "no voting power" for gains to active union "constituents" (A. 200). There is no support in the record for these notions which do not face up to the reasons upon which the Board came to its judgment. Unions constantly grapple with issues which may be of more or less importance to one class of employees than another. It is not the problem but its fair and effective resolution through collective bargaining, which becomes the joint concern of labor and management. Thus the Board was correct when it stated, concerning the precise issue in this case, that:

> "With respect to new problems which arise under a health insurance plan for retired employees, collec-

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[13] The court's suggestion that any attempted interference with retirees' bargained for benefits would be subject to a Section 301 action, 29 U.S.C. 185(a), is hardly realistic. Section 301 provides a remedy for breach of a collective agreement and was successfully used to require an employer to pay premiums on life insurance contracts of retired employees. *Upholsterers' Local 307 v. American Pad & Textile Co.*, 372 F.2d 427 (CA-6, 1967). But litigation for retired persons or a class action in their behalf is no substitute for collective bargaining.

tive bargaining is not only a suitable method for exploring different solutions, but it is probably the *most rational and effective* method." (A. 41, emphasis added.)

3. The enactment of Medicare presented a new problem and focused the attention of all workers upon health care services provided by private plans. The Company's pension program gave an employee, whose retirement was mandatory after July 28, 1964, a slim margin for major medical costs. In August, 1967, a year after Medicare became effective, an employee with 25 years of service would receive a monthly pension of about $64.00.[14] If he elected to participate in the insurance program provided by the Company it would cost $11.41 a month for the retiree and his spouse. The Company contributed $2.00 toward premium cost, resulting in a modest pension check of about $54.00 per month (A. 56, 67).

A budget for moderate living standards in 1966 for a retired couple in reasonably good health was $3,900. The medical care component alone of this budget was about $284.[15] Additional health care aid for persons in low retirement income groups was needed. Medicare made such aid possible by providing a basic plan of protection against the cost of hospital and related care for those 65 and over, and a voluntary supplemental plan covering payments for physicians and other medical and health services. The supplementary medical insurance program requiring separate enrollment covered 80 percent of the reasonable charges for physicians, home health

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[14] A retiree would receive $2.50 per month multiplied by the number of years of service before June 28, 1962, and $2.80 a month multiplied by the number of years of service for the Company after June 28, 1962 (A. Gen. Co. Exh. 4; 67, 120).

[15] Brackett, *A New Budget For a Retired Couple*, 91 Monthly Lab. Rev., p. 33, 35, June 1968.

care and numerous miscellaneous medical and health services, 42 U.S.C. 1395(k), 1395(l).[16]

The impact of these changes brought about by enactment of public law made it important to adjust the Company's plan without disadvantage to the retirees. Because of this the Union asked the Company in November, 1965 to amend its plan to add services not supplied by Medicare (A. 122, 154). The necessity to coordinate Medicare and its supplementary coverage with existing private plans created an immediate need for effective resolution without disadvantage to the retirees. Bargaining for this purpose could have taken many forms.[17] The Board very properly referred to the extent of bargaining in this context as shown in the lower court briefs *amici curiae* of the United Steelworkers, United Automobile Workers and Amalgamated Transit Union (A. 42). Under these circumstances the Board said:

> "* * * to deny collective bargaining a role in the development of health benefits plans for retired employees might undermine their viability. These private plans provide an important supplement to governmental social welfare programs, and an effective method of dispute settlement will contribute to their purposefulness." (A. 41)

Both the Company and the Union recognized the importance of bringing the negotiated plan in line with Medicare. In rejecting the Union's request to bargain about this, however, the Company refused to allow "a

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[16] Due to higher costs of medical care and the greater use of medical services the monthly premium for each individual involved will be increased to $5.60 effective July 1, 1971. CCH, *1971 Social Security and Medicare,* ¶ 635, p. 192.

[17] Foust, *Effect of Medicare On Privately Bargained Plans,* 19 New York University Conference on Labor Law, 273-285 (1966); Muntz, *Bargaining For Health,* p. 90, 91, 92.

problem of vital concern to labor and management," *Fibreboard Paper Products Corp., supra,* 379 U.S. at 211, to be discussed "within the framework established by Congress as most conducive to industrial peace."

D. THE BOARD'S DECISION IS SUPPORTED BY JUDICIAL CONSTRUCTION OF SECTION 302 OF THE ACT.

The Board's conclusion that retirement benefits are embraced by the bargaining obligation of Section 8(a)(5) is based in part on decisions construing Section 302 of the statute, 29 U.S.C. 186 (App., *infra,* pp. 37, 38). Section 302 makes it a misdemeanor for an employer to pay and a union representative to receive money except that payments made to a jointly administered pension or welfare trust for the sole and exclusive benefit "of the employees" are exempt.[18] Appellate courts have construed Section 302(c)(5) to cover both "current employees and persons who were covered current employees but are now retired." *Blassie v. Kroger Co.,* 345 F.2d 58, 70 (CA-8, 1965); *Garvison v. Jensen,* 355 F.2d 487 (CA-9, 1966). The lower court was "unpersuaded" by these decisions because "Section 302 is a criminal provision" (A. 194). That consideration does not provide adequate grounds for rejecting court decisions construing parallel language in the Act.[19]

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[18] The pension and retirement benefits involved here were not negotiated under § 302 of the Act.

[19] Section 302 of Title III establishing restrictions on payments of money to employee representatives, 29 U.S.C. 186, is not a separate unrelated matter. In *Wm. Wolf Bakery, Inc.,* 122 NLRB 630 (1958) the Board accepted the interpretation of the Department of Justice in holding valid, for contract-bar purposes, an agreement providing for the checkoff of union initiation fees, dues, and assessments. See also, *Int'l. Union Mine, Mill & Smelter Workers v. American Zinc,* 311 F.2d 656 (CA-9, 1963); *NLRB v. Food Fair Stores, Inc.,* 307 F.2d 3 (CA-3, 1962).

In *Blassie v. Kroger Co.*, the district court, 225 F. Supp. 300 (E.D. Mo.) held that Section 302(c)(5) restricted use of fund assets for the sole benefit of active employees, and that retirees could not be the beneficiaries of a trust for medical and insurance benefits. The court of appeals (in an opinion by then Circuit Judge Blackmun) reversed the district court's construction of the statute that current enjoyment of benefits under Section 302(c)(5) was restricted "to persons in active employment." The court reasoned as follows (345 F.2d at 69):

> "c. * * * the presence of these two requirements—payment by the employer and current employment—does not mean that benefits which flow from these contributions of the employer (and from any other receipts of the Trust) are to be confined in their enjoyment to the period of the employee's active employment. There is nothing in the statute which clearly prescribes this and we see nothing in its language which could support so restrictive an inference.
>
> "d. The statute by its very language obviously contemplates the enjoyment of certain benefits after an employee's retirement or while he is inactive. It speaks of pensions on retirement or death, of compensation for illness resulting from occupational activity, of unemployment benefits, of life insurance, of disability and sickness insurance, and the like. And § 302(c)(6) refers to 'severance or similar benefits.'
>
> "e. Any plan for the health and economic well-being of employees, whether it be one gratuitously granted or one hammered out by hard bargaining, would normally be expected to embrace the crises of unemployment, retirement and disability, as well as those of the better times of active employment. An opposite result, with benefits available only when the weather is fair and the needs are less, would be ironical in application and, we feel, should not be

reached without a clearer indication of congressional intent than we have here. The Supreme Court, in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 468 * * * (1960), observed, 'It is a commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age, or death.' The trend of welfare plans toward the inclusion of retired persons is a fact of today's industrial life which needs no documentation here.

"f. * * * Benefits after retirement are not an evil at which the statute was directed."

The court also stated (345 F.2d at 70):

"* * * All we do in this civil proceeding is to construe the term 'employees' to mean covered current employees and persons who were covered current employees but are now retired. This is not non-literal construction but one which, we think, comports with the ordinary and literal meaning of the term." [20]

In *Garvison v. Jensen* the Ninth Circuit Court of Appeals said (355 F.2d 487, 488):

"* * * We see nothing in the language or purposes of section 302(c)(5) which would require that medical and hospital benefits for retired employees be financed by employer contributions made during the period of an employee's active service, rather than being financed in whole or in part by current employer contributions."

The clear holding of these cases is that retired persons are not to be denied welfare benefits provided by payments to a trust meeting the qualifications of Section 302(c). The phrase "for the sole and exclusive bene-

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[20] Accord, *Local 688, Teamsters v. Townsend*, 345 F.2d 77 (CA-8, 1965) holding that where the trust agreement so provided, "benefits after retirement * * * are not prohibited or illegal under § 302(c)(5)," 345 F.2d at 78, 79.

fit of the employees" (302(c)(5)) is thus held to include retired persons. In this respect unions, of course, do represent "retirees."

The lower court also rejected interpretations of the word "employee" by the Internal Revenue Service (A. 194). The court of appeals in *Blassie*, however, found them supportive of the result reached in that case. The court said (345 F.2d at 69):

> "g. The requirement of § 302(c)(5)(C) that payments intended for pensions or annuities flow into a separate trust administered exclusively for that purpose contains no contrary implication apparent to us. The requirement of separateness, and, for that matter, the requirement of exclusiveness of benefit for employees tie in, not unexpectedly, with those provisions of the Internal Revenue Codes exempting qualified pension and welfare trusts from income taxation. * * *"

A trust, forming part of a pension plan, must be "for the exclusive benefit" of employees or their beneficiaries to be qualified under Section 401 of the Internal Revenue Code, 26 U.S.C. 401, and exempt from taxation under Section 501(a). The Internal Revenue Service has ruled that a qualified plan "is for the exclusive benefit of employees or their beneficiaries even though it may cover former employees as well as present employees * * *." 26 C.F.R. 1.401-1(4). The 1962 amendment, Pub. L. 87-863, 26 U.S.C. 401(h) specifically provides that under regulations of the Secretary a pension plan may provide for payment of hospitalization and medical expenses of "retired employees." [21] The absence of legislative history

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[21] The Service has held that the term "employee" includes "retirees" who were formerly "common-law" employees if the coverage provided for them is based upon their former services as employees. Rev. Rul. 68-577, Internal Revenue Bulletin 1968-2, p. 52.

was referred to also in *Blassie v. Kroger, supra,* when the court said that the failure specifically in the Congressional debates to link retired persons to health care was not "any indication of an intent to deprive them of such benefits. Indeed, the opposite inference—that they are not mentioned because no one conceived them to be excluded—is reasonable," 345 F.2d at 70. If Congress had intended to exclude retirees as current beneficiaries of pension and insurance funds in Section 302 it could have done so explicitly. See *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17, 29 (1962).

E. THE COMPANY UNILATERALLY CHANGED A PROGRAM OF RETIREMENT BENEFITS BY NEGOTIATING DIRECTLY WITH THE RETIREES.

Despite the imperative need for constructive collective bargaining to resolve the issues raised by Medicare, the Company refused to bargain with the Union and then unilaterally changed its insurance plan for the retired employees. The decision below is erroneous in its holding that this was "not the case * * * of an employer bypassing the union and bargaining directly with active employees" (A. 191, n. 9). This holding does not square with the undisputed facts found by the Board (A. 45-46).

The Union initiated discussion in November, 1965 to coordinate Medicare with the Company's insurance program. The Company made its first response in March, 1966 and later reconsidered because of the Union's justifiable criticism of a proposal which did not protect pensioners and their wives under age 65 (A. 14, 126). A few days later the Company told the Union that it would deal directly with the employees (A. 28).

The Company's direct dealing forced retirees to make a hard choice. They could, (1) continue coverage under the existing plan without duplication of benefits paid for

under Medicare, or (2) discontinue their enrollment in the negotiated plan, in which event the Company would contribute $3.00 per month to cover the cost of supplemental Medicare. About 15 of the retired employees cancelled their participation in the negotiated health insurance plan (A. 28) as a result of the Company's decision. The fact that retirees were allowed to continue existing coverage did not make the proposal any the less a *new* Company insurance program to replace the one negotiated with the Union in 1964. When assistance of the Union was most needed to advise retirees and their wives, "the Company refused to bargain with the Union * * *" (A. 186).

This was a violation of Section 8(a)(5) and (1) of the Act (App., *infra*, p. 34). An employer's unilateral change in a negotiated insurance plan violates the statute, *NLRB v. Katz*, 369 U.S. 736, 743 (1962). *Katz* is instructive because after the union in that case had proposed modifications of a sick leave plan, the employer without notifying the union, announced changes which benefited some employees but adversely affected others. This Court said:

> "* * * Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." (369 U.S. at 747)

See also, *NLRB v. General Electric Co.*, 418 F.2d 736, 746 (1969), cert. denied 397 U.S. 965 (1970). There the Second Circuit Court of Appeals said:

> "Ordinarily, the matter would be relatively simple; it appears well settled that insurance is a mandatory subject for collective bargaining, and the employer violates section 8(a)(5) of the National Labor Relations Act by refusing to bargain over it (Citing

cases). He would, of course, also violate the Act if he unilaterally changed the conditions or terms of employment. See *NLRB v. Katz*, 369 U.S. 736 (1962) * * *."

An employer is not free to negotiate directly with employees or make unilateral changes in a negotiated insurance plan, *NLRB v. Scam Instrument Corp.*, 394 F.2d 884, 887 (CA-7, 1968), cert. denied 393 U.S. 980 (1968). The court said that the benefits were not subject to the unilateral reduction which *Scam* effected, "without notice to or consultation with the Union, by means of the rider it requested of its insurance carrier." It held: "We are of the opinion that the Board was correct in concluding that the unilateral change in benefits effected by Scam constituted an unfair labor practice violative of Section 8(a)(5) and (1) and of Section 8(d) of the Act." In *NLRB v. Huttig Sash & Door Co.*, 377 F.2d 964, 967 (CA-8, 1967), the court enforced an order of the Board finding the employer to have violated Section 8(a)(5) and (1) of the Act by a unilateral modification of a contract in mid-term without following the procedures of Section 8(d) of the Act. The court followed *NLRB v. Katz*, 369 U.S. 736, 743 (1962) and *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209-210 (1964).

In the instant case the Company's unilateral action was only one way of bringing its plan in line with Medicare. The full range of other possibilities was never discussed with the Union and retirees were denied the advantage of union representation to explore the alternatives that were available.

Accordingly, neither the record nor the court's interpretation of the statute justifies the result reached by the court of appeals in this case. The Board was correct in holding that the subject matter of health insurance and

retirement benefits of retired employees is properly embraced by Section 9(a) of the Act since it relates to "rates of pay, wages, hours of employment, or other conditions of employment," and that retired employees are "employees" within the meaning of the statute for the purposes of bargaining about changes in their retirement benefits.

CONCLUSION.

The judgment of the court of appeals should be reversed and the case remanded with instructions to enter a decree enforcing the Board's order.

Respectfully submitted,

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April, 1971.

APPENDIX.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., 151, *et seq.*) are as follows:

DEFINITIONS.

Sec. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

RIGHTS OF EMPLOYEES.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid

or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES.

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this

Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing:

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

* * * * *

REPRESENTATIVES AND ELECTIONS.

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * *

Relevant provisions of Title III of the Labor Management Relations Act, 29 U.S.C. 186, are as follows:

Sec. 302 (c) The provisions of this section shall not be applicable

* * * * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal

office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training program: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.